plaintiff's attorney by account books kept by the plaintiff in his moneylending business.

Section 18(1) reads as follows:

"Every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Ordinance clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages".

To keep a regular account, in my opinion, would mean to keep an account book in which every entry is made as and when a transaction is completed and in chronological sequence. Section 18 further requires that the book should be so paged and bound so as "not to facilitate the elimination of pages or the interpolation or substitution of pages." It would be logical to infer from this directive that no blank pages should be left between the pages containing entries because such a practice would facilitate interpolation of entries.

In P.3 and P.5 there are no intervening blank pages, but it is evident that some of the intervening pages must have been left blank at some time or other. For instance, at page 17 of P.3 the date of the entry is 1st of July 1960 whereas the entries on pages 16 and 18 refer to transactions entered into on the 1st of January 1960. Again at page 32 a transaction dated the 28th of July 1960 is entered whereas the entry on page 33 relates to a transaction dated the 19th of May 1960 and the entry at page 34 is dated the 8th of January 1960. Likewise in P.5 an entry dated 11th of September 1959 appears at page 12 whereas an entry dated 31st of March 1959 appears at page 13. It is therefore clear that the entries were not made in chronological sequencec and that P.3 and P.5 were not regular accounts kept in accordance with the requirements of section 18(1). The entries above referred to must have been made on pages which had been left blank or the account books must have been written up at the end of each year and in so doing the entries were inadvertently mixed up. I therefore hold that by virtue of section 18(2) of the Moneylenders Ordinance the claim must fail.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Arulanandom & Co.; Dharmananda & Co.*

PERIASAMY v. SUPPIAH

[A.C.J. (Raja Azlan Shah J.) July 18, 1966]

[Raub — Civil Appeal No. 1 of 1966]

Negligence — Damage caused by bull belonging to defendant — Whether bull of class of animals mansuetae naturae.

Animals mansuetae naturae — Control of bull by another — Right to control.

This was an appeal against the judgment of the learned president, who had awarded damages against the defendant for injuries caused to a bull of the plaintiff, which was pulling a cart, by the bull of the defendant. It was argued that the learned president was wrong in holding that the appellant was liable or that he was guilty of negligence.

Held: on the facts as found by the learned president there was ample evidence to justify his conclusion that the defendant (appellant) was negligent in allowing the bull to cause damage to the plaintiff's bull.

Cases referred to:—

(1) *Powell* v. *Strantham Manor Nursing Home* [1935] A.C. 243 at p. 256.

(2) *Barnes* v. *Lucille Ltd.* (1907), 96 L.T. 680.

(3) *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 580.

(4) *Samson* v. *Aitchison* [1912] A.C. 844.

(5) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 195 - 196.

(6) *Norton* v. *Canadian Pacific Steamships Ltd.* [1961] 1 W.L.R. 1057.

(7) *Ormood* v. *Crosville Motor Services Ltd.* [1953] 1 W.L.R. 1120.

CIVIL APPEAL.

S. Kulasegaram for the appellant.

The respondent in person.

Raja Azlan Shah J. (delivering oral judgment): This is an appeal by the defendant against the judgment of the learned president, sessions court, sitting at Raub. The plaintiff testified that on the date and time in question he was driving a cart which was being pulled by two bulls along the Raub-Benta main road. The defendant's cattle, including a bull, were then grazing at the roadside. Suddenly the defendant's bull attacked one of the plaintiff's bulls, resulting in injuries to the latter animal. That is the case as alleged by the plaintiff in the court below. The defendant denied that he was the owner of the cattle including the bull in question. The learned president came to the conclusion that the bull which attacked the plaintiff's bull belonged to the defendant. He based his decision on the evidence of the plaintiff and witnesses Nos. 2, 3, 4 and 5. P.W.2 in evidence stated that he knew that the defendant owned the bull that attacked the plaintiff's bull. He had seen the defendant attending to the bull and giving it grass to eat at Sempalit. He also said that the defendant had owned the bull for the past one year. He had also seen the defendant escorting the cattle home. P.W.3 testified that he had bought four head of cattle from the defendant. P.W.4 had stated that he had bought fresh cow's milk from the defendant. P.W.5 said that he knew the defendant had a bull dark-brown in colour and that he had seen the defendant attending to his cattle in the cattle shed. On the other hand, the defendant testified that he had no bull on the date in question. It is a question of which

side to believe on the balance of probabilities. The learned president chose to believe the plaintiff's version and awarded him damages.

The judgment of the court below has been attacked by counsel for the appellant. It was said that there was no proper identification of the bull in question, and the particular bull was not produced within the precincts of this court. His argument was based on the premise that the plaintiff had adduced insufficient evidence of ownership of the bull. In this connection I would like to cite a passage from the case of *Powell* v. *Streatham Manor Nursing Home* [1] and I quote:

"The case was tried by a judge sitting alone, and on appeal from the decision of a judge the Court of Appeal and this House have a duty to exercise their jurisdiction as tribunals of appeal on fact as well as on law, a jurisdiction which your Lordships have never hesitated to exercise when satisfied that the courts below have erred on a question of fact. Where, however, as in the present instance, the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error".

That well-known principle has been repeatedly followed by our courts, and I see no reason to depart from that principle in the present case. It has not been shown to me that the learned president was wrong in his assessment of the facts and I am of the view that on the evidence before him he was entitled to come to the conclusion he did, and I am not disposed to interfere on his finding of fact.

It was then said in argument by counsel that there was no evidence adduced by the plaintiff that the mother-in-law of the defendant was his servant so as to impute him with liability. That aspect of the case is linked with the next proposition put forward by counsel and I will deal with it in a moment. I wish to make it plain here that we are not concerned with cattle-trespass or damage done by dangerous animals, and therefore cases connected therewith are not applicable in the instant case.

Counsel further argued that in the instant case the learned president had failed to direct himself on the law in that the plaintiff had to prove knowledge of the mischievous propensity of the bull in question. I accept as a question of law that the bull belonged to the class *mansuetae naturae*. When damage is done by an animal *mansuetae naturae* the plaintiff must prove, firstly, that the animal had previously committed or attempted to commit at least one act that showed the particular kind of viciousness now complained of, secondly, that the defendant knew of the act or attempt in question. I quote a passage from the 14th edition of *Salmond* on Torts at pp. 474-475 where the author cited a passage from *Williams* on Liability for Animals:

"Unless there is evidence to the contrary, I must assume that it is not natural for a bull to attack another bull; therefore it is necessary for the plaintiff to prove that the defendant actually knew that the bull was dangerous and had departed from the peaceful habit of its species".

In this case liability can only be based on the defendant's actual knowledge of the particular animal's past conduct. That principle is well established. However, in *Barnes* v. *Lucille Ltd.* [2] it was there held that it is not necessary to prove that the animal has on any previous occasion actually done the kind of harm complained of. It is enough that it has sufficiently manifested a tendency to do such harm and that the defendant was aware of the fact. In the present case the plaintiff has from cross-examination of the defendant elicited from him the following facts:

"Two years ago I had appeared in court as defendant to defend a similar case. It was dismissed".

In the court below both parties were unrepresented. I have called for the civil suit file in question which bears C.S. No. 86 of 1963. In that case the plaintiff was one Kartar Singh son of Mol Singh and the defendant is the present appellant, Periasamy. The third paragraph of the statement of claim stated as follows:

"That on 3.11.1963 at about 12.00 noon the plaintiff tied up his bullocks to the different trees by the roadside at 1st mile Lipis Road, Raub, and he went home for lunch. At about 12.45 p.m. on the same day he came out from his house to see the bullocks, but he was surprised to see that one of the bullocks fell to the ground and injured, i.e. the right horn was broken and bleeding and I saw a bullock belonging to the defendant was nearby. When the plaintiff's bullock was attacked by the defendant's bullock Messrs Jang Singh and Suppiah were at spot and they separated them . . . .".

Jang Singh and Suppiah gave evidence supporting the plaintiff's case. However, the defence was not called and the case was dismissed. After reading the notes of evidence as recorded by the court in that case it is clear that the case was based on cattle-trespass. It is now said that case is not conclusive for present purposes because we are not in a position to know whether that same bull emerged again in the present case. In this connection I refer to the evidence of P.W.5 in the present case in which he stated that he knew that the defendant had a bull, dark-brown in colour. P.W.2 stated in evidence:

"The defendant has been having the bull for the past one year before that day", i.e. 18.6.1965.

All things being equal, it is highly probable that the defendant had owned that bull in 1963. That being the case, the position is clear. The plaintiff has established on the balance of probabilities that the defendant knew that this particular bull has had a mischievous propensity

to attack another bull and causing similar damage. Once that has been established, the plaintiff succeeds under the scienter rule.

It was also argued that the mother-in-law who was then looking after the cattle and the bull was not the servant of the defendant so as to found liability against the defendant. That argument is only significant and relevant if the knowledge of the mother-in-law is to be imputed to the defendant on a basis of master and servant relationship. However, the present case is different as the defendant himself has knowledge of the mischievous propensity of the bull. It therefore follows that argument is not tenable. However, the plaintiff's claim is based on negligence and it is on that aspect of the case that this present appeal has to be decided. Paragraph 6 of the plaintiff's statement of claim states:

"The defendant was negligent to the extent that he did not exercise proper care and control of such a bull when grazing near the main thoroughfare".

It is a perfectly clear principle of law that a man may be involved in liability for damage done by his animals under the general principle of negligence. In such case the plaintiff must prove a duty owed to him by the defendant. It is also perfectly clear that he is liable if his animal damaged his neighbour's property. Who is one's neighbour has been judicially defined. Lord Atkin in the celebrated case of *Donoghue* v. *Stevenson* [3] stated the law as follows:

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have been in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question".

That classic statement bears reference to 'persons' but I have no doubt that includes his property as well. Applying that test, it is beyond doubt that the defendant owes a duty to the plaintiff to take reasonable care not to damage the plaintiff's property which is in the near neighbourhood. On the facts as found by the learned president the defendant has failed to take reasonable care as a result of which the plaintiff's bull was injured.

It was submitted that the cattle including the bull were looked after by the defendant's mother-in-law and therefore the defendant cannot be imputed with liability because the mother-in-law was not his servant. It was said that the mother-in-law should be so sued or joined as defendant. It is common ground that a man may vicariously be liable through the act of his servant and the dominant consideration in that case is the well known principle that the servant must be subject to the control and direction of his employer in respect of the manner in which his work is to be done. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid but, in my opinion, that is not essential. One person may be the servant of another on a single occasion and for an individual transaction provided the element of control and supervision is present. Moreover, the service may be merely gratuitous, as where a child acts *de facto* as the servant of his father or the owner of a vehicle asks a friend to drive it. The test of service is not physical control but the right to control. The right of control may be deduced from the circumstances of each case, such as the fact that the owner of a motor-car remains in it while allowing another to drive, *Samson* v. *Aitchison.* [4] Even if there is no right of control, the owner of a vehicle may be liable if he has delegated to the other the duty of looking after it (*Hewitt* v. *Bonvin;* [5] *Norton* v. *Canadian Pacific Steamships Ltd* [6]) or if it is being used partly or wholly on the owner's business or for the owner's purposes, *Ormood* v. *Crosville Motor Services Ltd.* [7] On the analogy of the above principle it is beyond doubt that the mother-in-law was looking after the cattle and bull for the defendant's purposes. It is equally clear that the defendant had an interest in them. Therefore, on the facts as found by the learned president there is ample evidence to justify his conclusion that the defendant was negligent in allowing his bull to cause damage to the plaintiff's bull.

The appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *Athi Nahappan & Co.*

CHONG SIN ONN v. KUCHING MUNICIPAL COUNCIL

[O.C.J. (Harley Ag.C.J. (Borneo)) July 20, 1966]

[Kuching — Civil Suit No. K. 28 of 1966]

Tort — Obstruction — Construction of a rail by local authority — Interference with access to premises — No proof of pecuniary damage — Statutory authority — Kuching Municipal Ordinance (Cap 116), s. 84.

The plaintiff sought a declaration that the defendants a local authority were not entitled to keep a rail in front of his clinic between it and the street and he asked for an order that the defendants pull down the rail and an injunction to restrain defendants from obstructing his patients and himself and his staff from getting into the clinic. The plaintiff did not prove that he had in fact suffered any pecuniary loss or that his practice as a dentist was affected. The defendants denied that the plaintiff's enjoyment of his premises had been adversely affected or interfered with and claimed that the rail was properly constructed as part of the authorised powers given to the defendants.

Held: as (a) on the facts of the case the plaintiff's access to his clinic had not been substantially interfered